Law or Politics?

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Article 19(1) TEU is emerging as the lynchpin of the EU's legal order. It sets down the essential guarantees and organization of the EU judiciary, imposes a duty on Member States to afford effective legal protection of individual rights under EU law, and, over the past two years, it has been used to push back against attacks on judicial independence and other forms of democratic backsliding in Poland as well as Hungary. For good reason, therefore, the BVerfG's PSPP judgment has raised concerns beyond the ambit of central bankers and finance ministers, among EU constitutional lawyers more generally speaking. In the PSPP judgment, the BVerfG says that not only the ECB acted ultra vires, but so too the CJEU—the CJEU failed to act in accordance with law and carry out its duty to "ensure that in the interpretation and application of the Treaties the law is observed" under Article 19(1) (163). One can only imagine the use that will make of this assertion in the multiple EU legal proceedings that have been brought against Hungary and Poland for democratic backsliding and, more broadly, in any proceeding before the CJEU seeking to enforce compliance with EU law.

The rest of this post contributes to the growing body of legal writing that analyzes the BVerfG's 19 (1) conclusion and shows that it is itself problematic as a matter of law. My central point is that the CJEU's proportionality analysis that induced the BVerfG's ultra vires finding might not satisfy the standards of *German* constitutional law—but it *does* hold up under the formal text and jurisprudence of *EU* constitutional law. In the immediate predecessor to this judgment, the German litigation on the ECB's OMT Programme, Justice Lübbe-Wolff issued a forceful dissent and she issued the following warning for future cases (25):

> That some few independent German judges – invoking the *German* interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it *appears as an anomaly of questionable democratic character* [emphasis added].

That, I argue, is precisely what has occurred here, with important implications for the lawfulness of the CJEU and the legitimacy of the BVerfG's PSPP judgment.

BVerfG's Critique of the CJEU

In the view of the BVerfG, the problem with the CJEU's proportionality analysis is the failure to consider adequately the PSPP's impact on economic policy (133). This is defined in the narrow, fiscal sense—the balance sheets of countries and commercial banks—and in the broader, economic and social sense—rates of return

and risk-taking in pension plans, asset bubbles, and so on (139, 171, 172, 173.)
The proportionality test requires that government action be (1) suitable and (2) necessary to accomplish the objectives pursued, and that it (3) not disproportionately burden the right or interest at stake (proportionality in the strict sense). Although the BVerfG is generally critical, it finds greatest fault with the third, strict-sense prong of the test—to simplify somewhat, the charge is that the CJEU blindly accepted the ECB's monetary policy rationale, did not independently scrutinize the bond-buying program's economic policy effects, and failed to determine whether the effect (and burden) on economic policy was outweighed by the benefits accomplished by the bond-buying program in terms of protecting against deflation (133, 138, 168).

To engage with this critique, it is necessary to take a step back and ask a more basic question—why should a proportionality assessment of an instrument of *monetary policy*, which no one doubts is at least in part designed to increase money supply and combat deflation, examine that instrument's effect on *economic policy*? There are two different answers—one under EU law, the other under German law.

German Law

First, German law. Although it is a complex and evolving area of jurisprudence, the bottom line is that under German law, state control over fiscal and economic policy has been attached to the individual, constitutional "right to democratic self-determination." EU monetary policy that affects fiscal policy is conceived as burdening that right of democratic self-determination. Therefore, such measures must satisfy a rigorous, three-step proportionality test familiar to both EU and German lawyers from other areas, such as those involving fundamental rights like privacy and the right to family.

The contours of this German right have been developed by the BVerfG in a line of cases that accelerated after the Lisbon judgment and that now counts the decisions on the EFSF, the ESM, the OMT, and the PSPP. In this jurisprudence, the Stability and Growth Pact element of the Maastricht Treaty's monetary union (in German legal writing is called a "stability union," what some more bluntly call "Austerity Union") has been essentialized as the non-negotiable condition under which Germany ratified the Maastricht Treaty. Any departure involving Germany's budgetary powers, i.e. assumption of debt liability or transfer of resources, requires a vote in the Parliament (ESM judgment,110, 118) and, following the logic of the Lisbon judgment's "identity lock," this is a requirement that cannot be given away by Parliament (EFSF judgment, 125) Below I call this the "right to stability" but it should be kept in mind that departures can be authorized based on a parliamentary vote, thereby satisfying the underpinning right to democratic self-determination.

In tandem with this essentialization of EU fiscal stability, the BVerfG has dramatically expanded the ability of individuals to vindicate the right through constitutional complaints. Like most European systems of public law, Germany distinguishes between what can be called "subjective rights" on the one hand, and "objective interests," on the other—the jurisdiction and remedies of courts are reserved for important forms of individualized harm (subjective rights), while the

vindication of objective interests is left to a large degree to the political process. The "right to democratic self-determination" used to belong to the objective category, but the BVerfG has made it progressively easier to bring constitutional complaints against EU acts (by attacking the associated positive acts or failures to act of German bodies) based on this right. It is precisely this subjectivization of the right to democratic self-determination, combined with the distinctive, budgetary definition of democracy, that triggered the passage from Justice Lübbe-Wolff's dissenting opinion in the OMT case—her concern, together with that of her fellow dissenter in the case (Justice Michael Gerhardt), and a large segment of the German legal community, is that it has become too easy to mobilize the BVerfG (and the view of a handful of judges on economic policy) to engage in what are in essence, political questions, not legal questions.

How then does the German right to stability figure in the BVferG's PSPP proportionality analysis? First, the Court requires that there be a hard line drawn between monetary policy and economic policy so that the impact of the bond-buying program on economic policy, i.e. the burden on the German right to stability, can be assessed (127). There is an implicit on-off switch in the PSPP judgment—exclusive competence for monetary policy, virtually no competence for economic policy. Although from the perspective of German law this might be understandable, from the perspective of EU law and the Treaty's system of competences it is far from evident that such a hard line can be drawn. That is why the BVerfG itself waivers in how it characterizes EU power over economic policy—from something that "in principle remains a competence of the Member States" (120) to "limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large" (127) to the assertion that, even though it might not be possible to say exactly how, economic policy must be different from monetary policy since "the Union only has an exclusive competence for monetary policy [but not for the matters of economic policy]." (142). The fact is that, as even non-lawyers can tell you, in the European south, the EU does has extensive power over economic policy–although it is generally speaking economic policy of the austerity variety, which has been applied through the European Semester and which has legal and political bite mostly in debtor Member States. When the BVerfG says that ECB monetary policy should not have effects on economic policy, it doesn't have in mind the austerity variety of economic policy, but it is hard to see how a general competence analysis at the EU level can draw a distinction between the two.

Second, the BVerfG requires that the proportionality test include a full-fledged, "strict sense" third step. In the proportionality principle, regardless of whether German or EU law is in play, a thorough analysis on the third step is generally reserved for important rights or interests that could potentially outweigh what has already been established to be a legitimate and essential public policy measure. Under EU law it is not immediately apparent what that important right or interest would be. But it is under German law—the right to stability. According to the BVerfG, on the third step, the economic policy effects, i.e. the burden on the German right to stability, must be fully assessed (139). The assessment of the economic policy burden should be broad-ranging—not just the impact on the debt burden and fiscal liability

of governments, but also more generally on social and economic policy, because that is what the Lisbon judgment says is an essential component of the Bundestag's budgetary power. And this economic policy burden must be balanced against the monetary policy benefits of combating deflation.

Third, the BVerfG calls for "full judicial review" of the impact of the ECB's bond-buying program on economic policy (142). This standard is required because it is "imperative that the mandate of the ECSB be subject to strict limitations given that the ECB and the national central banks are independent institutions . . . which means that they operate on the basis of a diminished level of democratic legitimation." (143) Again, from the perspective of EU law, it is not self-evident that the ECB should be subject to stringent standards of judicial review, since it can be characterized as a both a constitutional body (since it is created by the primary law of the EU Treaties) and a technical or administrative body (since its legitimacy derives in large part from the fact that it possesses the economic expertise necessary for monetary policy). However, stricter judicial review of the independent ECB does follow a certain doctrinal logic under the German right to stability. In German constitutional law, delegations of power to administrative bodies are problematic for the reason, familiar to most democratic systems of public law, that elected representatives should make important policy decisions. This is handled by requiring a certain amount of specificity in delegating legislation, in particular when individual rights are burdened (*Wesentlichkeitstheorie*), and through judicial review based on that legislation. Before there was the ECB, there was the Bundesbank, and the German central bank's independence and policy powers were recognized as an anomaly in this general theory of democratic legitimation. However, since there were generally no individual rights burdened by the Bundesbank's policymaking (the effect on property from potentially inflationary policies was considered too remote), it mostly escaped constitutional review. Now that there is the right to stability, the ECB does not enjoy the same latitude of action and the determination of the proportionality of its bond-buying program is to be subjected to "full judicial review"—but again, as a matter of German, not EU, constitutional law.

EU Law

I now turn to EU law, and the doctrinal place for considering the *economic policy* effects of an instrument of *monetary policy.* Typically under EU law, competence and proportionality are separate grounds for challenging the validity of an EU act. This doctrinal scheme is a product of the longstanding framework for judicial review of the validity of EU acts contained in Article 263 TFEU, as well as the somewhat more recent principle of conferral and proportionality, first recognized by the Maastricht Treaty (Article 3b EC Treaty) and since elaborated in the Lisbon Treaty (Article 5 TEU). In this doctrinal scheme, economic policy effects enter not under competence analysis, but proportionality.

Under EU law, the issue of competence is address by examining whether the Treaty provision offered as the *legal basis* for the act is the proper legal basis. Most often, the litigant challenges the act on the grounds that an alternative Treaty provision and

policy objective was applicable—generally a Treaty provision that requires unanimity voting in the Council and therefore one that would stymie action or a Treaty provision that bars the type of act adopted. Very often such litigation involves internal market acts, since the mandate for internal market harmonization is quite broad and involves qualified majority voting in the Council, unlike Treaty provisions in other policy areas that can specifically bar certain types of measures and that can impose significant procedural hurdles to adopting EU acts. The CJEU examines whether the EU's asserted legal basis is supported by the reasons listed in act's preamble, by the content of the act, by the plausibility (or implausibility) of the connection between objectives and content, and, sometimes, by additional material produced in the litigation. C-84/94, 25; C-217/04, 42; C-317/04, 67-69; C-270/12, 113; C-358/14, 31-70. It generally does not examine the plausibility of the alternative policy objective and Treaty provision, even in those cases where there is a claim that the EU institution's choice of legal basis was designed to circumvent a prohibition on action contained in another Treaty provision. C-76/98, 79, 85. When examining the EU's asserted legal basis, there is no deference, since assessing whether there is a mandate for action is a pure legal question of interpretation of the Treaty.

This competence (legal basis) analysis may be followed by a proportionality analysis. The EU test mirrors the German proportionality test described earlier. The CJEU sometimes follows a two-part scheme (appropriate and necessary), but other times also includes a third step involving balancing and the requirement that "disadvantages caused must not be disproportionate to the aims pursued." C-331/88, 13. When applying this proportionality test to assess the validity of EU acts, the CJEU generally employs the deferential "manifest error" standard of review, particularly when the EU act is taken directly pursuant to powers conferred in the primary law of the TFEU.

Although couched in somewhat different terms because it responds to the BverfG's preliminary reference, the CJEU's judgment in the PSPP litigation follows this classic sequence of first examining the legal basis of the PSPP (46-70) and then analyzing its proportionality (71-100). The CJEU examines the monetary policy legal basis offered by the ECB for the PSPP. Based on the enumeration of exclusive competences in Article 3 TFEU and the text contained in the specific provisions of the TFEU's Title on Economic and Monetary Policy, the CJEU concludes that (51):

> the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ECSB is to support the general economic policies in the Union with a view to contributing to the achievement of tis objects, as laid down in Article 3 TEU.

There is no categorical separation of monetary and economic policy (as the BVerfG says there should be) and no bar on ECB measures aimed at price stability also impacting economic policy (60) —but that is because the Treaty text does not contain such a bar, with the exception of Article 123 TFEU, which the CJEU takes up in a separate portion of the judgment. The CJEU then examines the PSPP and finds that the aims and substance of the program come within the scope of these legal

powers. On this competence (legal basis) step of the analysis, there is no deference to the ECB.

The CJEU then takes up the proportionality issue and analyzes the appropriateness (71-78) and necessity (79-92) of the measure, as well as the potential disproportionate advantages (93-99). In the interest of space, I will jump straight to the issue of disproportionate disadvantages, since that is the part of judgment that elicited the strongest objections from the BVerfG. On disproportionate disadvantages: The CJEU examines the PSPP rules to limit the liability of Member States for defaults on the debt issued by other Member States and finds that exposure was adequately limited (93-99). This last step of proportionality, in particular, did not satisfy the BVerfG. Yet it is fully in line with how the CJEU balances countervailing economic interests in prior cases, the closest analogue being cases where a Member State offer the market rights of economic actors as what is disadvantaged by the EU act. Further, as a matter of EU legal logic, it is difficult to make a case for treating these facts different—since the right to stability advanced in the German litigation does not figure in the EU Charter of Fundamental Rights or anywhere else in EU primary law.

The last thing to note about the CJEU's proportionality analysis is that it applies the familiar "manifest error of assessment" standard. The rationale for this standard is linked to the technical expertise of monetary institutions (24). This discretion afforded to European central banks is completely in line with other litigation that has challenged ECB acts in the CJEU. (C-62/14, 68; T-79/13, 68) It is also in line with EU proportionality review of EU acts in a variety of other policy areas. Take one—environmental law. There, this is the standard of review is applied to the (independent) Commission (T-614/13, 63) and to the Council (C-86/03, 88). Again, the manifest error standard does not live up to the BVerfG's call for more rigorous review of the independent ECB. But again, under EU law, it is hard to discern any principled ground for singling out the ECB for special, stricter judicial review as compared to other EU institutions—only under German law.

Law, Politics, and the Legitimacy of the CJEU and BVerfG

Let me conclude by returning to Article 19 TEU. Based on this discussion of the EU legal standards that apply to the CJEU, it is evident that the CJEU abided by the Treaty text and jurisprudence that govern the assessment of the validity of EU acts. Indeed, had the CJEU required the ECB to provide special justification for the PSPP, it might very well have transgressed those standards. The claim that the CJEU judgment was ultra vires rests entirely on the German right to stability under German constitutional law. But that leaves us with another question—if the CJEU cannot be accused of acting outside of the law and illegitimately taking sides in what is a deeply divided political debate, what about the BVerfG? In finding the CJEU judgment and the ECB PSPP ultra vires, and developing, over the past 10 years, the doctrinal edifice necessary to do so, did the BVerfG act outside the law? Has it illegitimately taken sides in the hotly contested German and European politics of

Economic and Monetary Union and the viability of the Eurozone and the European project? That is certainly something that should and will be debated in the months and years to come.
